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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 118

Between

JOSIAH V. THOMPSON, as Trustee for Lida Eleanor Purcell Fitzgerald, Edward Maurice Fitzgerald and Gerald Purcell Fitzgerald of the trusts hereinafter described, Lida Eleanor Purcell Fitzgerald, John Purcell Fitzgerald, Edward Maurice Fitzgerald and Gerald Purcell Fitzgerald, infants, by William McClelland, their guardian *ad litem*,

Plaintiffs,

and

GERALD PURCELL FITZGERALD, individually and as Trustee of the trusts hereinafter described; CHARLES E. LENHART, as Trustee of the trusts hereinafter described, GERALD PURCELL FITZGERALD and CHARLES E. LENHART, partners as Fayette Coke Company and Shamrock Supply Company, CHARLES E. LENHART, Manager of Fayette Coke Company and Shamrock Supply Company,

Defendants.

BRIEF FOR RESPONDENTS

W. W. PARSHALL and E. J. ARNETT, two of the present Trustees for Petitioners and others and A. A. THOMPSON and JOHN S. HARAH, Administrator of G. S. HARAH, deceased, former Trustees, our petition of Princess Lida of Thurn and Taxis, formerly Lida Eleanor Purcell Fitzgerald, and John Purcell Fitzgerald for Writ of Certiorari to the Supreme Court of Pennsylvania.

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STATEMENT OF THE CASE.

The petitioner, LINA, PRINCESS OF THURN AND TAXIS, in 1899 was married to Gerald Purcell Fitzgerald, a resident of the Isle of Waterford, in Ireland (17 a). In 1906 the husband and wife instituted divorce proceedings against one another and by agreement dated December 6, 1906 (17 a) executed by them, Josiah V. Thompson and Charles E. Lenhart, Fitzgerald covenanted that after dissolution of the marriage, he would pay to Thompson, Lenhart and himself as trustees

(1) So much of his share of the annual profits accruing from Fayette Coke Company and Shamrock Supply Company, partnerships operating in Fayette County, Pennsylvania and composed of Fitzgerald and Lenhart, as would yield an annuity of $15,000.00 per annum for three years and thereafter $20,000.00 per annum to be paid to the wife for life (18 a, 19 a);

(2) One-third of his share of the annual profits to be invested until there should accumulate the sum of $300,000.00, one-half of the income therefrom to be paid to the wife for life; the other half either to accumulate or to be expended for the benefit of the children; or the trustees in their discretion might pay the entire income to the wife until the eldest child attained the age of 21 years; as each child became 21 years, he was to receive his share of the income as of right, and on the death of the wife and after the youngest child attained the age of 21, the trustees were to distribute the remainder of the fund and all accumulations thereon among the surviving children (19 a, 20 a).

The agreement provided that in the event of the death or resignation of any of the trustees, the two re

maining should appoint a successor, or on their failure to do so, either of them or the wife should have the right to petition the Court of Common Pleas of Fayette County, Pennsylvania to fill the vacancy (21 a). The wife agreed to relinquish all rights of dower and alimony (22 a) and the agreement contained certain provisions for the custody and control of the children (23 a).

The marriage was dissolved by Act of Parliament in 1907 (44 a) and the stipulated payments were duly made until 1910 (90 a). In that year a Bill in Equity was filed in the Fayette County Court by Thompson as trustee (15 a), the wife and three children by their guardian *ad litem*, against Fitzgerald and Lenhart as trustees, Fitzgerald individually, and the Fayette Coke Company and Shamrock Supply Company, asking the Court to remove Fitzgerald and Lenhart as trustees, to declare and establish a lien upon the properties of the companies in order to secure the payment of the sums provided for in the agreement, to construe the trust Agreement and instruct the trustees accordingly, to require Fitzgerald and Lenhart, as members of the partnerships, to account for and pay into the Trust, or to a sequestrator or receiver to be appointed by the Court, the proper share of Fitzgerald's profits and make such subsequent accountings as might be necessary during the term of the Agreement, and to restrain defendants from alienating or encumbering any of the properties of the companies (49 a, 50 a). Answers were filed to the Bill. That of Fitzgerald asked by way of counter-relief that the Agreement of 1906 be declared null and void, that Thompson be ordered to account to the Trust for monies received by

him and that he be removed from his office as trustee of the fund for the children (63 a). The suit culminated in 1911 in a decree which—affirmed on appeal by the Supreme Court of Pennsylvania, 233 Pa. 242, writ of error dismissed, 222 U. S. 555—ordered defendants to pay amounts then remaining due under the Agreement, adjudged the payments stipulated in the Agreement to be a lien on Fitzgerald's interest in the real estate owned by Fayette Coke Company, removed Fitzgerald from his office as trustee, directed him to account for and pay over to the trust all sums in his hands held as trustee and restrained him from alienating or encumbering his interest in the property of the companies until the sum of $300,000.00 should have accumulated in the fund for the children (140 a-142 a).

In the place of Fitzgerald, William M. Thompson was appointed trustee by Thompson and Lenhart; he resigned in 1915 and William W. Parshall was appointed by the Court of Common Pleas of Fayette County in his stead (7 a). In the same year, Josiah V. Thompson, Lenhart and Parshall, the then trustees, filed a petition with the Court of Common Pleas of Fayette County, alleging that disputes had arisen between them and Fitzgerald with regard to a proper construction of the Agreement as to the profits of Fayette Coke Company (143 a), and that an agreement had been reached whereby Fitzgerald was to assign to the trustees his interest in the sinking fund of that company, and also to pay to them certain additional sums during the period of seven years aggregating the sum of $400,000.00, these payments to be secured by a mortgage to the trustees on Fitzgerald's undivided interest in the real estate of the Fayette Coke Company. The

payments were to be invested by the trustees and the net income together with the interest on the mortgage, was to be applied to the payment of the wife's annuity, and upon her death the $400,000.00, or such part thereof as had then accumulated, was to be returned to Fitzgerald, and the mortgage satisfied. The petition prayed the Court to modify the decree of 1911 so as to permit the new agreement to become effective (149 a). Accordingly the Court entered such a decree (151 a-154 a).

The fund of $400,000.00 was directed to be invested and re-invested by this decree, and the income realized therefrom used to pay to the wife the annuity of $20,000.00 in lieu of the arrangement under the agreement and former decree which simply required the trustees to collect from the Fayette Coke Company the sum of $20,000.00 annually and pay it over to the wife. The fund of $400,000.00 was completely paid into the hands of the trustees in 1925.

In 1918 the resignation of Josiah V. Thompson (8 a) and in 1919 that of Lenhart was presented to the State Court and it was ordered that they be discharged from further accountings (8 a). Their places were supplied by G. S. Harah and Andrew A. Thompson, these appointments being approved and confirmed by the Court (9 a).

In 1925 the trustees, Harah, Andrew A. Thompson and Parshall, filed their First and Partial Account in the State Court which was duly advertised and confirmed (9 a). On July 7, 1930 a Second and Partial Account of the Trust was filed (10 a), this time by Parshall and Andrew A. Thompson as surviving trustees, Harah having died on April 23, 1930, and Robert

J. Arnett was appointed to succeed Harah and his appointment was confirmed by the Court.

The present controversy had its inception with the filing of a Bill in Equity in the District Court of the United States for the Western District of Pennsylvania on July 8, 1930 by Princess Lida of Thurn and Taxis, the original Plaintiff who had remarried, a citizen of Hungary, together with her eldest son John, then a citizen of the State of New York, against Andrew A. Thompson, Parshall and Arnett, trustees, and the administrators of the estate of G. S. Harah, all citizens of Pennsylvania (188 a).

The Bill alleged that there was in the wife's Alimony Fund upwards of $456,000.00 and in the Children's Fund upwards of $315,000.00, both of these sums including undistributed income, that among the investments in the Alimony Fund were certain mortgages on which interest and principal were long overdue and which were alleged to be unfit investments for trust funds, improperly made by the trustees, that there were other securities in the trust which had caused losses, and that the trustees were mismanaging the Trust Estate, had failed to render proper accounts, and were not fit persons to act as trustees (192 a-194 a). The Bill prayed that the trustees be required to file an account, that they be removed as trustees, and that all trustees under the deed of trust be required to give bond with surety for the faithful performance of their duties (194 a). A motion to dismiss the Bill was denied by the District Court (208 a-213 a), whereupon the trustees filed an answer alleging that the mortgages complained of were lawful investments, denied the allegations as to losses, mismanagement of

the estate and of failure to render accounts, and declared that itemized statements of the funds had been furnished annually to the Princess, that an account had been filed and confirmed in the Fayette County Court in 1925, and that another account had been filed July 7, 1930, the day before the Bill was filed in the District Court, which account was awaiting confirmation by the Fayette County Court (213 a-230 a).

Thereafter nothing was done with the equity proceedings in the Federal Court for several years. In April 1937 the petitioners here filed an amendment to the Bill in the Federal Court (230 a-236 a), specifying certain bonds and mortgages in the Trust Funds which they assert were illegal investments, alleging that the amount of the funds invested in mortgages was too great and for the prayer of the original Bill asking for the filing of an account, there was substituted one that the trustees be required to restore the funds, that is, the monies lost by their alleged illegal and negligent conduct. To the Amended Bill the trustees filed an answer (236 a-244 a), stating that all the bonds and mortgages challenged by the petitioners had been included in the account filed in the Fayette County Court in 1925, or in the one filed in 1930, and further alleging that to the account filed in 1930 exceptions had been filed which were pending in the Fayette County Court, and that while losses had occurred in some of the investments, accretions on others more than compensated therefor (236 a-244 a).

On May 1, 1937 the trustees filed a petition in the Fayette County Court setting forth that the prosecution of the suit in the Federal Court constituted an interference with the sole and exclusive jurisdiction of

the State Court, and prayed for a decree restraining the Princess and her son John from further prosecuting the Federal action (159 a-162 a). A rule to show cause why the restraining order should not be issued was allowed (164 a). The Princess filed answer alleging that the Fayette County Court never had control and possession of the trust funds, and that there was no controversy there pending when the Bill in Equity was filed in the District Court, that the accounts filed by the trustees were *ex parte* proceedings, and denying that the State Court had exclusive jurisdiction over the subject matter of the suit in the Federal Court (165 a-172 a).

On June 29, 1937 the State Court made the trustees' rule absolute and entered the decree enjoining the Princess and her son John from prosecuting the equity suit in the Federal Court (174 a).

On July 6, 1937, the Princess and her son John appealed to the Supreme Court of Pennsylvania, which Court affirmed the decision of the Fayette County Court (329 Pa. 497; 198 Atlantic 58; Appendix page 20).

On the same day John Fitzgerald filed a petition in the United States District Court to restrain the trustees from proceeding further in the Court of Common Pleas of Fayette County (246 a-249 a). An Answer was filed by the trustees (250 a), and the District Court on September 18th made an order fixing a hearing "on the jurisdictional issue" for November 8, 1937, and meanwhile enjoined the trustees as prayed in the petition (257 a). On July 19, 1937 the trustees filed in the Fayette County Court a Third and Partial Account of the two funds in trust to which exceptions were filed (13 a).

On the same date that the Supreme Court of Pennsylvania handed down an opinion affirming the action of the Fayette County Court, to-wit, March 21, 1938 (Appendix Page 20), the United States District Court for the Western District of Pennsylvania handed down an opinion (Petitioners' Appendix A) in which it held that the action of the State Court was an action in *personam* and not an action in *rem* or *quasi* in *rem* as was held by the Supreme Court of Pennsylvania. No findings of fact or final decree has ever been entered by the District Court (Petitioners' Appendix page 34).

ARGUMENT.

The fundamental question involved is whether the proceedings originally instituted in the state court in 1910 were in *personam* or *in rem* or *quasi in rem*. The Supreme Court of Pennsylvania held them to be of the latter nature. The District Court held them to be *in personam*.

Respondents' position in both Courts has at all times been that the state Court proceedings were *in rem* and that they had never terminated; Petitioners' position is that the proceedings were terminated in the State Court.

In

Peck v. Jenness, 48 U. S. 612, 624, 625, it was said:

> "It is a doctrine of law too long established to require a citation of authorities, that where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and * * * where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken

away by proceedings in another court. These rules have their foundation, not merely in comity, but on necessity. For if one may enjoin, the other may retort by injunction, and thus the parties be without remedy; being liable to a process for contempt in one, if they dare to proceed in the other."

As is said by Mr. Justice Stern of the Supreme Court of Pennsylvania from the judgment of which Court Petitioners are here appealing:

"In actions in rem the law is otherwise. 'It is settled that where a federal court has first acquired jurisdiction of the subject matter of a cause, it may enjoin the parties from proceeding in a state court of concurrent jurisdiction where the effect of the action would be to defeat or impair the jurisdiction of the federal court. Where the action is in rem, the effect is to draw to the federal court the possession or control, actual or potential, of the res, and the exercise by the state court of jurisdiction over the same res necessarily impairs, and may defeat, the jurisdiction of the federal court already attached. The converse of the rule is equally true, that where the jurisdiction of the state court has first attached, the federal court is precluded from exercising its jurisdiction over the same *res* to defeat or impair the state court's jurisdiction.' Kline v. Burke Construction Company, 260 U. S. 226, 229. In such cases, therefore, the rule is that the court which first acquires jurisdiction of specific property by the possession thereof, or by the commencement of a suit from which it appears that it is necessary to . determination of the controversy, or to the enforcement of the prospective judgment or decree, for the court to have control and dominion over the property, thereby withdraws it from the jurisdiction of every other court so far as is necessary to accomplish the purpose of the suit, and the court is entitled to retain such control as is requisite to effectuate its final judgment or decree free from the interference of every other tribunal. 'The res is as much withdrawn from the judicial power of

the other court as if it had been carried physically into a different territorial sovereignty.': Covell v. Heyman, 111 U. S. 176, 182. The tribunal whose jurisdiction first attaches 'holds it to the exclusion of the other until its duty is fully performed and the jurisdiction invoked is exhausted.': Taylor v. Taintor, 83 U. S. 366, 370."

To the same effect are

Byers v. McAuley, 149 U. S. 608,

Merritt v. American Steel-Barge Co., 79 Fed. 228, 231,

Farmers' Loan & Trust Co. v. Lake Street Elevated R. R. Co., 177 U. S. 51,

in which it was stated (61):

"Nor is this rule restricted in its application to cases where property has been actually seized under judicial process before a second suit is instituted in another court, but it often applies as well where suits are brought to enforce liens against specific property, to marshal assets, *administer trusts,* (italics supplied) or liquidate insolvent estates, and in suits of a similar nature where, in the progress of the litigation, the court may be compelled to assume the possession and control of the property to be affected. The rule has been declared to be of especial importance in its application to Federal and state courts."

The above language was quoted in

Palmer v. State of Texas, 212 U. S. 118, 129

At the risk of repetition, it may not be amiss to direct attention to the precise nature of this proceeding.

The cause was instituted by a Bill, the primary object of which was to charge specific property with a lien to secure the payment of certain sums out of the profits of a mining property against which the lien was sought.

The lien was established by the original decree in this cause. No payment was to be made directly to any beneficiary. The lien could be realized upon and enforced only by trustees and only through the medium of the trustees could the beneficiaries receive payment.

This lien was a thing, an entity, or res. It was itself a trust fund held by the trustees for the use of the beneficiaries, but to be administered and enforced only by the trustees.

In 1915 the character of this lien was radically changed. It was transmuted into a mortgage to secure the payment of $700,000.00 less a certain sum already accumulated.

Thus a genuine trust fund was created consisting of the mortgage and the then accumulations. The accumulations were to be invested and re-invested by the trustees, and as the mortgage was from time to time paid, the proceeds were to be likewise invested and reinvested. The trust is to continue during the lifetime of Lida, one of Petitioners. At her death it terminates. The principal of the alimony fund, $400,000.00, then becomes payable to Fitzgerald, who supplied the money or his heirs or assigns. The $300,000.00 then becomes distributable to the children, John, Gerald and Edward.

All the promises to pay out of profits of the business as contemplated by the original contract have been eliminated, and for them has been substituted a specific fund to be kept invested by the trustees during the continuance of the trust. It requires active and continuous administration. Out of the income realized from the investment of the principal, certain annual payments are to be made.

This is a trust estate, pure and simple.

At the death of Petitioner Lida, the trust terminates and there must be a final settlement. The principal fund will then be transferred in kind to the beneficiaries or converted into money and the proceeds distributed, or it may be that part of it may be set over in kind and the remainder sold.

The trust fund having been created by the decree of the State Court, by a voluntary submission of the parties to its jurisdiction, that Court has sole and exclusive jurisdiction over it and of its administration until final settlement.

This is the doctrine of the cases cited, and it here applies in its full vigor because this trust fund is itself a res, entity or thing of which that Court has potential control and constructive possession.

Matters of administration are questions arising in the course of this cause, and it was said in the Peck case (48 U. S. 612), "That when a court has jurisdiction it has a right to decide every question which occurs in the cause."

In the Farmers' Loan case (177 U. S. 51) it is laid down that the rule is not restricted to cases where property has been actually seized, "but it often applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates."

Here the suit was brought to establish a lien, and in its present status is the administration of a trust.

In that case it is further said that the rule applies to cases where "the court may be compelled to assume

the possession and control of the property to be affected."

Here the Court may be compelled, in order finally to settle this trust, to direct the sale of the trust property in whole or in part.

Actual physical possession is not necessary. In Harkin v. Brundage, 276 U. S. 36, it is predicated that "the court which first obtains jurisdiction and constructive possession of property by filing the bill is entitled to retain it without interference and cannot be deprived of its right to do so."

The State Court has control of the property in question, for as is said in Wabash R. R. v. Adelbert College, 208 U. S. 38, the Court which first acquires control of property has "jurisdiction to hear and determine all questions respecting the control of the property", which precludes the jurisdiction of any Court of coordinate authority.

In Kline v. Burke Construction Co., 260 U. S. 226, it is declared that the effect of the doctrine is to "draw to the Federal Court (mutatus mutandi to the state court) possession or control, actual or potential, of the res and the exercise by the State Court of jurisdiction over the same res necessarily impairs and may defeat the jurisdiction of the Federal Court."

In

Penn General Casualty Co. v. Pennsylvania, 294 U. S. 189,

it was said (195):

> "Where the judgment sought is strictly in personam, for the recovery of money or for an injunction compelling or restraining action by the defendant, both a state court and a federal court

> having concurrent jurisdiction may proceed with the litigation, at least until judgment is obtained in one court which may be set up as res adjudicata in the other * * * But if the two suits are in rem, or *quasi* (Italics supplied) in rem, requiring that the court or its officer have possession or control of the property which is the subject of the suit in order to proceed with the cause and to grant the relief sought, the jurisdiction of one court must of necessity yield to that of the other * * * The principle, applicable to both federal and state courts, is established that the court first assuming jurisdiction over the property may maintain and exercise that jurisdiction to the exclusion of the other."

The action in the State Court is clearly in rem and possession and control of the trust property is potentially in that Court. Because there is a res, the action is certainly not personal, and whether it be strictly in rem or only *quasi* in rem makes no difference as is set forth in the language of Justice Stone in the Penn General Casualty case (294 U. S. 189) just quoted.

A Court, whether state or federal, which first acquires potential control of property, whether by the mere filing of a bill to subject that property to the management or ultimate disposition of such Court, or by the entry of decrees impressing it with certain trusts which may ultimately require its disposition by such Court, acquires jurisdiction that is sole and exclusive so far as that property is concerned.

It is important in this connection to bear in mind that the Alimony Fund of $400,000.00 came into being by virtue of the decree of the Court of Common Pleas of Fayette County of March 5, 1915. Prior to that decree no fund existed. The only duty of the trustees so far as concerned the alimony payments to the petition-

er Lida was the collecting of the monies due her from Fayette Coke Company and paying them over to her. The decree itself created the fund.

Petitioners argue that their proceeding in the District Court is in personam and that they there seek judgment against Respondents.

However, the most that they can secure in the District Court would be a surcharge and the removal of the trustees. Such a surcharge would not be a judgment to pay money to them as in an ordinary personal action. The order could only be that the trustees make restitution either to themselves or to their successor trustees. Any recovery in their suit in the District Court would be by the trust fund and not by petitioners.

Mr. Justice Stern of the Supreme Court of Pennsylvania, in concluding his opinion, says:

> "The line of distinction between proceedings in personam and those in rem to determine whether or not the jurisdiction acquired by the court in which they are first instituted is exclusive is not to be drawn with academic nicety. The question is rather one of practical regard for the orderly and efficient administration of justice. If, as here, a court has made or confirmed the appointment of trustees, has audited, and continues to be engaged in auditing, their accounts, and, in general, has controlled the management and administration of trust funds for a considerable period of time, and another court were to attempt to remove such trustees, appoint others, pass upon the propriety of investments already investigated and adjudicated or in process of investigation and adjudication by the first court, and make orders on the trustees as to the furnishing of surety bonds and similar matters, the management and administration of the trust would be thrown into chaotic condition.

> As has already been pointed out, practically all the investments specifically attacked in the bill filed by appellants in the federal court were contained in the account audited and confirmed by the county court in 1925 or in the 1930 account now pending audit, or in both. Unless such successive steps in the administration of a trust be regarded as a unit, the result would be, not only that partial accounts could be successively filed and adjudicated in different courts, but the same account could be audited simultaneously by two courts, with the obvious possibility of contradictory orders regarding the custody and sale of investments and the liability of the trustees."

It is true that the Supreme Court of Pennsylvania has decided on the one hand that the action is one in rem or quasi in rem, and that the District Court for the Western District of Pennsylvania has decided that the action is one in personam. If the refusal of a writ of certiorari to the Supreme Court of Pennsylvania by this Court will not make the decision of the Supreme Court of Pennsylvania the law of the case, then Respondents have no objection to the granting of the certiorari.

Petitioners Lida and John, Plaintiffs in the Bill and Amended Bill in the Federal Court, were parties plaintiff in the action in the State Court. They were suitors for the purpose of procuring a lien on specific property out of which the present trust funds have arisen.

They were parties in the action in the State Court when the lien was converted into a fixed sum to be realized and administered as directed by the decree of 1915 (151 a-154 a).

From that time they have regularly received and accepted the income to which, in virtue of that decree,

they are respectively entitled; they have claimed and enjoyed the benefits of that decree. Having come into the State Court, and it, at their instance, having created the fund, and having begun the administration thereof, it is not within their power or right to withdraw from the jurisdiction of the State Court that subject matter and to review the administration of that fund in any other tribunal. This results inevitably from the principles heretofore discussed.

In final analysis, what they are attempting is to call upon the trustees to account, at least in part, in a court other than the one whose jurisdiction they first invoked.

This cause was originally attempted to be removed to the United States Court (222 U. S. 555) in 1911 (6 a), and by one of these Petitioners in 1930 (10 a, 11 a), his petition being refused by the Court of Common Pleas of Fayette County, Pennsylvania, (10 a, 11 a).

(a) The Petitioners' Proceedings in the Federal Court which were enjoined by the State Court are not Candid.

Neither the Bill nor the Amended Bill in the District Court makes even indirect reference to the proceedings in the State Court in this cause. The original contract is set up, but that a lien to secure the payments to be made was established in virtue of the decree of the State Court is not mentioned.

Neither was it disclosed that Fitzgerald had made payment in full of all sums required by the original contract by him to be made and that a principal fund to yield an income, out of which the payments to Petitioner Lida were to be made had been created, and that this was all done in virtue of the decree of the

State Court. In like manner, it was not made to appear that an active trust to continue during the lifetime of Lida, requiring management and administration, had been established, and that the trust fund had been in the control and jurisdiction of the State Court since 1915.

There was no reference made to the fact that the trustees had filed two accounts in the Court of Common Pleas of Fayette County, Pennsylvania, one of which had been confirmed in 1925 and the other, which remained pending in that Court, subject to exceptions filed by another beneficiary for the benefit of all parties in interest, which two accounts included every investment challenged by the original Bill in the Federal Court and all investments challenged by the Amended Bill save one. As the Bill and the Amended Bill in the Federal Court were drawn, they of course did not on their face show that the State Court had sole and exclusive jurisdiction, and consequently, the motion to dismiss in the Federal Court did not lie.

Whether intended or not, the result is that Petitioners did not fairly disclose the facts on which the jurisdiction of the State Court had attached and which precluded the Federal Court from taking jurisdiction. In Harkin v. Brundage, 276 U. S. 36; 72, Law, Ed. 457, Chief Justice Taft said (465):

> "In this country, in which in every state we have courts of concurrent jurisdiction under the Federal and the state authority, it is of the highest importance that conflict of jurisdiction should be avoided. It can only be avoided by forbearance and comity, and by enforcing upon the parties and counsel engaged the utmost good faith and the fullest disclosure in one jurisdiction with reference to what are the exact facts relevant to litigation in a corresponding case in the other."

Continuing, the Chief Justice said (466):

> "What was done here in delaying the state court and inducing the Federal court to act without a full disclosure of what had been done in the state court, was a fraud not only upon the state court but upon the Federal court itself, and when the Federal court learned the method by which its jurisdiction to appoint a receiver had been invoked, it should have denied to those who were guilty the further use of its jurisdiction until after the state court had been given an opportunity to exercise the jurisdiction which it was entitled to exercise, even to taking possession of the property."

The suit in the Federal Court was not in behalf of all of the beneficiaries—the remaindermen of the "Alimony Fund" is not made a party, and two of the beneficiaries of the "Children's Fund" are not parties.

A reading of the record discloses that the remainder of the "Alimony Fund" is held by the Second National Bank of Uniontown, in trust for certain purposes, and to join it would oust the jurisdiction of the Federal Court. Gerald Fitzgerald, Jr. has a one-sixth interest as life tenant in the "Children's Fund" and a one-third interest in the remainder of that fund. He is a citizen of Pennsylvania, and to join him would oust the jurisdiction of the Federal Court.

It is very obvious that the accounts of the trustees cannot be settled in the proceedings in the Federal Court for want of indispensible parties, and to join these parties would oust the jurisdiction of that Court.

Respectfully submitted,

DEAN D. STURGIS,
W. BROWN HIGBEE,
Counsel for Respondents.

APPENDIX.

IN THE

SUPREME COURT OF PENNSYLVANIA

WESTERN DISTRICT.

JOSIAH V. THOMPSON, Trustee, *et al.*,

v.

GERALD PURCELL FITZGERALD, individually and as Trustee, *et al.*

Appeal of LIDA, PRINCESS OF THURN AND TAXIS (Hungary), and JOHN PURCELL FITZGERALD.

No. 172
March Term, 1937.
Appeal from Decree of Court of Common Pleas of Fayette County at No. 618 in Equity.
Reported 329 Pa. 497.

OPINION OF THE COURT.

STERN, *J.*:

In 1899 Lida Eleanor Niccols, a resident of Uniontown, was married to Gerald Purcell FitzGerald. Of the union were born three children, John, Edward and Gerald. In 1906 husband and wife instituted divorce proceedings against one another, and by agreement dated December 6, 1906, executed by them, Josiah V. Thompson and Charles E. Lenhart, and recorded in Fayette County, FitzGerald covenanted that after dissolution of the marriage he would pay to Thompson, Lenhart and himself, as trustees, (1) so much of his share of the annual profits accruing from Fayette Coke Company and Shamrock Supply Company—partnerships operating in Fayette County and composed of FitzGerald and Lenhart—as would yield an annuity of $15,000 per annum for three years and thereafter $20,000 per annum, to be paid to his wife for life; (2) one-third of his share of the annual profits, to be in-

vested until there should accumulate the sum of $300,000, one-half of the income therefrom to be paid to his wife for life, and the other half either to accumulate or to be expended for the benefit of the children; or the trustees, in their discretion, might pay the entire income to his wife until the eldest child attained the age of twenty-one years; as each child became twenty-one he was to receive his share of the income as of right, and on the death of the wife and after the youngest child had attained the age of twenty-one the trustees were to distribute the remainder of the fund and all accumulations thereon among the surviving children. The agreement provided that in the event of the death or resignation of any of the trustees the two remaining should appoint a successor, or on their failure to do so either of them, and also the wife, should have the right to petition the Court of Common Pleas of Fayette County to fill the vacancy. The wife agreed to relinquish all rights of dower and alimony, and there were provisions for the custody and control of the children.

The marriage was dissolved by Act of Parliament in 1907, and the stipulated payments were duly made until 1910. In that year a bill in equity was filed in the Fayette County court by Thompson as trustee, Mrs. FitzGerald, and the three children by their guardian ad litem, against FitzGerald and Lenhart as trustees, FitzGerald individually, and the Fayette Coke Company and Shamrock Supply Company, asking the court to remove FitzGerald and Lenhart as trustees, to declare and establish a lien upon the properties of the companies in order to secure the payment of the sums provided for in the agreement, to construe the trust agreement and instruct the trustees accordingly, to

require FitzGerald and Lenhart, as members of the partnerships, to account for and pay into the trust, or to a sequestrator or receiver to be appointed by the court, the proper share of FitzGerald's profits and make such subsequent accountings as might be necessary during the term of the agreement, and to restrain defendants from alienating or encumbering any of the properties of the companies. Answers were filed to the bill. That of FitzGerald asked, by way of counter relief, that the agreement of 1906 be declared null and void, that Thompson be ordered to account to the trust for moneys received by him and be removed from his office as trustee of the fund for the children. The suit culminated in 1911 in a decree which—affirmed on appeal to this court, 233 Pa. 242—ordered defendants to pay the amounts then remaining due under the agreement, adjudged the payments stipulated in the agreement to be a lien on FitzGerald's interest in the real estate owned by Fayette Coke Company, removed FitzGerald from his office as trustee, directed him to account for and pay over to the trust all sums in his hands held as trustee, and restrained him from alienating or encumbering his interest in the property of the companies until the sum of $300,000 should have been accumulated in the fund for the children.

In place of FitzGerald, William M. Thompson was appointed a trustee by Thompson and Lenhart; he resigned in 1915 and William W. Parshall was appointed in his stead. In that same year Josiah V. Thompson, Lenhart and Parshall, the then trustees, filed a petition with the Fayette County court alleging that disputes had arisen between them and FitzGerald in regard to the proper construction of the agreement as to the profits of Fayette Coke Company, and that an

agreement had been reached whereby FitzGerald was to assign to the trustees his interest in the sinking fund of that company, and also to pay to them certain additional sums during a period of seven years, aggregating the sum of $400,000, these payments to be secured by a mortgage to the trustees on FitzGerald's undivided interest in the real estate of the Fayette Coke Company. The payments were to be invested by the trustees, and the net income, together with the interest on the mortgage, was to be applied to the payment of the wife's annuity, and upon her death the $400,000, or such part thereof as had then accumulated, was to be returned to FitzGerald and the mortgage satisfied. The petition prayed the court to modify the decree of 1911 so as to permit this new agreement to become effective. Accordingly the court entered such a decree.

In 1918 the resignation of Josiah V. Thompson, and in 1919 that of Lenhart, was presented to the court and it was ordered that they be discharged from further accountings. Their places were supplied by G. S. Harah and Andrew A. Thompson, these appointments being approved and confirmed by the court. In 1925 the trustees, Harah, Andrew A. Thompson and Parshall, filed their first and partial account which was duly advertised and confirmed. On July 7, 1930, a second and partial account of the trust was filed, this time by Parshall and Andrew A. Thompson as surviving trustees, Harah having died. Robert J. Arnett was appointed to succeed Harah and his appointment was confirmed by the court.

The present controversy started with the filing of a bill in equity in the District Court of the United States for the Western District of Pennsylvania, on July 8,

1930, by Mrs. FitzGerald, who by remarriage had become Princess Lida of Thurn and Taxis and a citizen of Hungary, together with her eldest son John, then a citizen of New York, against Andrew A. Thompson, Parshall and Arnett, trustees, and the administrators of the estate of G. S. Harah, the deceased former trustee, all citizens of Pennsylvania. The bill alleged that there was then in the wife's alimony fund upwards of $456,000, and in the children's fund upwards of $315,000, part of these sums including undistributed income, that among the investments in the alimony fund were certain mortgages on which interest and principal were long overdue and which were alleged to be unfit investments of trust funds improperly made by the trustees, that there were other securities in the trust which had caused losses, and that the trustees were mismanaging the trust estate, had failed to render proper accounts, and were not fit persons to act as trustees. The bill prayed that the trustees be required to file an account, that they be removed as trustees, and that all trustees under the deed of trust be required to give bond with surety for the faithful performance of their duties. After a motion to dismiss the bill was denied by the District Court, the trustees filed an answer alleging that the mortgages complained of were lawful investments, denying the allegations as to losses, mismanagement of the estate and a failure to render accounts, and declaring that itemized statements of the funds had been furnished annually to the Princess, that an account had been filed and confirmed in the Fayette County court in 1925, and that another account, filed July 7, 1930, was then awaiting confirmation in that court.

Nothing further was done in the equity proceeding in the federal court for several years. In April, 1937, the complainants there filed an amendment to their bill, specifying certain bonds and mortgages in the trust funds which they asserted were illegal investments, and alleging that the amount of the funds invested in mortgages on properties in Uniontown was too great. For the prayer of the original bill asking for the filing of an account there was substituted one that the trustees be required to restore to the funds "the moneys lost by their illegal and negligent conduct." To the amended bill the trustees filed an answer stating that practically all of the bonds and mortgages challenged by the complainants had been included in the account filed in the Fayette County court in 1925, or in that filed in 1930, or in both, that to the latter account exceptions had been filed and were pending in that Court, that, while losses had occurred in some of the investments, accretions on others more than compensated therefor, and that the criticisms made of the specified investments were not justified.

Meanwhile, on May 1, 1937, the trustees had filed a petition in the Fayette County Court setting forth that the prosecution of the suit in the Federal Court constituted an interference with the exclusive jurisdiction of the State Court, and praying for a decree restraining the Princess and her son John from further prosecution of that action. A rule to show cause why the restraining order should not issue was allowed. The Princess filed an answer alleging that the County Court never had control and possession of the trust funds, that there was no controversy there pending when the bill in equity was filed in the District Court, and that

the accounts filed by the trustees were ex parte proceedings, and denying that the State Court had exclusive jurisdiction over the subject-matter of the suit in the Federal Court. On June 29, 1937, the Fayette County Court made the trustees' rule absolute, and entered a decree enjoining the Princess and John Fitzgerald from prosecuting the equity suit in the Federal Court. The present appeal, taken on July 6, 1937, is by the Princess and her son from that decree of the Court below. At the same time John Fitzgerald filed a petition in the United States District Court to restrain the trustees from proceeding further in the Court of Common Pleas of Fayette County. After an answer was filed by the trustees, the District Court, on September 18, 1937, made an order fixing a hearing "on the jurisdictional issue" for November 8, 1937, and meanwhile enjoined the trustees as prayed in the petition. On July 19, 1937, the trustees had filed in the Fayette County Court a third and partial account of the two funds in the trust, to which exceptions were filed; testimony was also taken on the exceptions to the second account. The hearing fixed by the District Court was duly had, but no decision has thus far been rendered by that Court.

In *Peck v. Jenness*, 48 U. S. 612, 624, 625, it was said:

> "It is a doctrine of law too long established to require a citation of authorities, that, where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and * * * where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. These rules have their foundation, not merely in comity, but on necessity. For if one may enjoin, the other may re-

> tort by injunction, and thus the parties be without remedy; being liable to a process for contempt in one, if they dare to proceed in the other."

The present case is a concrete embodiment of these apprehended possibilities. An impasse exists as the result of each of two courts enjoining parties litigant from proceeding in the other.

The Federal Court, having all the equity jurisdiction possessed by the High Court of Chancery in England at the time of the adoption of the Judiciary Act of 1789, undoubtedly could have entertained the bill filed by appellants had there been no antecedent proceedings in the State court. The present question is whether, in view of those proceedings, the Fayette County Court had obtained a jurisdiction over the subject-matter which precluded action in any other court.

It is firmly settled that a prior suit in a State or federal court which does not deal, either actually or potentially, with specific property or objects, and in which nothing more than a personal judgment is sought, not only does not prevent another suit from being brought for the same cause in the court of the other jurisdiction, but does not even furnish ground for a plea in abatement to the second action: *Stanton v. Embrey*, 93 U. S. 548; *Gordon v. Gilfoil*, 99 U. S. 168; *Kline v. Burke Construction Co.*, 260 U. S. 226; *Merritt v. American Steel-Barge Co.*, 79 Fed. 228, 232; *W. E. Stewart Land Co. v. Arthur*, 267 Fed. 184; *Holmes County, Miss. v. Burton Construction Co.*, 272 Fed. 565. In such a case the first Court in which suit was instituted is not ousted of its jurisdiction, nor delayed or obstructed in its exercise thereof, nor is there any resulting conflict of authority. If a judgment is rendered in the second action before the first is tried, it will

support a plea of res adjudicata in the first suit if the issue and the parties are the same.

In actions in rem the law is otherwise.

> "It is settled that where a federal court has first acquired jurisdiction of the subject-matter of a cause, it may enjoin the parties from proceeding in a state court of concurrent jurisdiction where the effect of the action would be to defeat or impair the jurisdiction of the federal court. Where the action is *in rem*, the effect is to draw to the federal court the possession or control, actual or potential, of the *res*, and the exercise by the state court of jurisdiction over the same *res* necessarily impairs, and may defeat, the jurisdiction of the federal court already attached. The converse of the rule is equally true, that where the jurisdiction of the state court has first attached, the federal court is precluded from exercising its jurisdiction over the same *res* to defeat or impair the state court's jurisdiction." *Kline v. Burke Construction Company*, 260 U. S. 226, 229.

In such cases, therefore, the rule is that the Court which first acquires jurisdiction of specific property by the possession thereof, or by the commencement of a suit from which it appears that it is necessary to a determination of the controversy, or to the enforcement of the prospective judgment or decree, for the court to have control and dominion over the property, thereby withdraws it from the jurisdiction of every other court so far as is necessary to accomplish the purpose of the suit, and the court is entitled to retain such control as is requisite to effectuate its final judgment or decree free from the interference of every other tribunal.

> "The *res* is as much withdrawn from the judicial power of the other [court] as if it had been carried physically into a different territorial sovereignty": *Covell v. Heyman*, 111 U. S. 176, 182.

The tribunal whose jurisdiction first attaches "holds it to the exclusion of the other until its duty is fully performed and the jurisdiction invoked is exhausted"; *Taylor v. Taintor*, 83 U. S. 366, 370.

In *Byers v. McAuley*, 149 U. S. 608, where a decedent estate was being administered in an orphans' Court, the United States Supreme Court reversed the decree of a Federal Circuit Court which directed the administrator of the estate to file an account and formulated a schedule of distribution. The Court said (pp. 612, 620):

> "It is obvious from the decree which was entered that the Circuit Court of the United States assumed full control of the administration of the estate • • • The decree as a whole cannot be sustained, unless upon the theory that the Federal Court had the power on the filing of this bill to take bodily the administration of the estate out of the hands of the state court, and transfer it to its own forum • • • Our conclusion • • • is that the Federal court erred in taking any action or making any decree looking to the mere administration of the estate • • • •"
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> "The doctrine is well settled that when a court, in the progress of a suit properly pending before it, takes possession of property, either under a writ of replevin or attachment, or by other mesne or final process, or by the appointment of a receiver or assignee, its jurisdiction over the property for the time being becomes exclusive, and no other court can lawfully interfere with the possession so acquired • • •. The possession of the res vests the the court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and for the time being disables other courts of co-ordinate jurisdiction from exercising a like power. This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between courts whose jurisdiction embraces the same subjects and persons • • •. The doctrine in question is not limited in its appli-

cation to cases where property has actually been seized under judicial process before a second suit is instituted in another court, but it applies as well where suits are brought to enforce liens against specific property, to marshal assets, *administer trusts* (Italics supplied), or liquidate insolvent estates, and in all other suits of a similar nature, where, in the progress of the litigation, the court may be compelled to assume the possession and control of specific personal or real property. In cases of the latter kind, the rule is that the tribunal which first acquires jurisdiction of the cause by the issuance and service of process is entitled to retain it to the end without interference or hindrance on the part of any other court": *Merritt v. American Steel-Barge Co.*, 79 Fed. 228, 231.

In *Farmers' Loan & Trust Co. v. Lake Street Elevated R. R. Co.*, 177 U. S. 51, it was held that where a Circuit Court of the United States had obtained jurisdiction of a bill to foreclose a corporate mortgage, a State Court could not thereafter entertain proceedings for the removal of the trustee under the mortgage, the appointment of a new trustee, and the enjoining of the foreclosure proceedings. The Supreme Court said (p. 61):

"The possession of the *res* vests the court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and for the time being displaces other courts of co-ordinate jurisdiction from exercising a like power. This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between courts whose jurisdiction embraces the same subjects and persons."

And the court then proceeded with the same phraseology as in the opinion last quoted

"Nor is this rule restricted in its application to cases where property has been actually seized under judicial process before a second suit is instituted in another court, but it often applies as well

where suits are brought to enforce liens against specific property, to marshal assets, *administer trusts*, (Italics supplied) or liquidate insolvent estates, and in suits of a similar nature where, in the progress of the litigation, the court may be compelled to assume the possession and control of the property to be affected. The rule has been declared to be of especial importance in its application to Federal and state courts."

This same language was quoted in *Palmer v. State of Texas*, 212 U. S. 118, 129.

In *Waterman v. Canal-Louisiana Bank & Trust Co.*, 215 U. S. 33, the doctrine of *Byers v. McAuley, supra*, was reaffirmed and applied, the Court saying (p. 45):

"In view of the cases cited, and the rules thus established, it is evident that the bill in this case goes too far in asking to have an accounting of the estate, • • • for it is the result of the cases that in so far as the proper administration of the estate is concerned in the payment of debts, and the settlement of the accounts by the executor or administrator, the jurisdiction of the Probate Court may not be interfered with."

Nor is it necessary, for the rule to apply, that the first Court must have actual possession of the res involved in the litigation. In *Amusement Syndicate Co. v. El Paso Land Improvement Co.*, 251 Fed. 345, suit was brought in a State Court to compel the removal of certain structures upon land. A temporary injunction was issued. It was held that the Federal Court could not thereafter entertain a petition involving the same subject-matter, the Court saying (p. 348):

"If these proceedings have not brought the specific property involved—the res—into the actual possession of the State Court, they have at least given that Court dominion and control over it. It is true that injunction acts only in personam; but it is also true that possession of specific property may be, and often is, effected by and through in-

junctive process. These considerations I think clearly distinguish this case from one strictly in personam, where only a personal judgment is in view, and brings it within the rule that as between two Courts of concurrent jurisdiction the one which gets the case first holds it to the exclusion of the other."

The res, priority of jurisdiction over which makes such jurisdiction exclusive, need not consist of specific property or anything tangible, but may be merely a status, such as marriage, or the probate of a will. The test, as already stated, is not possession of the property, but jurisdiction over the res; *Dennison Brick & Tile Co. v. Chicago Trust Co.*, 286 Fed. 818, 820. So in *Brown v. Pacific Mutual Life Ins. Co.*, 62 Fed. (2d) 711, it was held that where a suit was instituted in a Federal Court to obtain the rescission and cancellation of a policy of life insurance, a subsequent action in a State Court to recover on the policy was properly enjoined.

In *Penn General Casualty Co. v. Pennsylvania*, 294 U. S. 189, it was said (p. 195):

> "Where the judgment sought is strictly *in personam*, for the recovery of money or for an injunction compelling or restraining action by the defendant, both a State Court and a Federal Court having concurrent jurisdiction may proceed with the litigation, at least until judgment is obtained in one Court which may be set up as *res adjudicata* in the other * * * But if the two suits are *in rem*, or *quasi* (italics supplied) *in rem*, requiring that the Court or its officer have possession or control of the property which is the subject of the suit in order to proceed with the cause and to grant the relief sought, the jurisdiction of one Court must of necessity yield to that of the other * * * The principal, applicable to both Federal and State Courts, is established that the Court first assuming jurisdiction over the property may maintain and exercise that jurisdiction to the exclusion of the other."

Apparently the latest expression by the Supreme Court of the United States upon the principle here involved is that in the case of *United States v. Bank of New York & Trust Co.*, 296 U. S. 463, where the Court said (p. 477):

> "In both these cases the proceedings in the State Court were *quasi in rem*. Control of the funds was essential to the exercise of the Court's jurisdiction to protect the rights of claimants * * *The principle, applicable to both Federal and State Courts, that the Court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of the other, is not restricted to cases where property has been actually seized under judicial process before a second suit is instituted. It applies as well where suits are brought to marshal assets, *administer trusts* (italics supplied), or liquidate estates, and in suits of a similar nature, where to give effect to its jurisdiction, the Court must control the property * * * If the two suits are *in rem* or *quasi in rem*, so that the Court must have possession or control of the res in order to proceed with the cause and to grant the relief sought, the jurisdiction of one Court must of necessity yield to that of the other * * * This principle is applied in the discharge of the long recognized duty of this Court to give effect to such 'methods of procedure as shall serve to conciliate the distinct and independent tribunals of the States and of the Union, so that they may co-operate as harmonious members of a judicial system coextensive with the United States.'"

It is true, as held in many cases,* that where the action brought in the Federal Court is merely to estab-

*Suydam v. Broadnax, 39 U. S. 67; Green's Administratrix v. Creighton, 64 U. S. 90; Yonley v. Lavender, 88 U. S. 276; Byers v. McAuley, 149 U. S. 608; Security Trust Co. v. Black River National Bank, 187 U. S. 211; Waterman v. Canal-Louisiana Bank & Trust Co., 215 U. S. 33; Richie v. Margolies, 279 U. S. 218; Commonwealth Trust Co. of Pittsburgh v. Bradford, 297 U. S. 613; General Baking Co. v. Harr, 300 U. S. 433; Harrison v. Moncravie, 264 Fed. 776; Commonwealth Trust Co. of Pittsburgh v. Atwood, 78 Fed. (2d) 92.

lish an interest or right to share in property being administered in a State Court, it may properly be prosecuted, since a judgment in such a suit would not disturb the control of the State Court over the fund or estate as to which it had taken jurisdiction. There is, however, a limitation that the exercise of such jurisdiction of the Federal Court does not include the power to draw to it the administration of the estate or to interfere in any way with its management or control.

> "Such proceedings are not *in rem;* they seek only to establish rights; judgments therein do not deal with the property and order distribution; they adjudicate questions which precede distribution": *Commonwealth Trust Co. of Pittsburgh v. Bradford,* 297 U. S. 613, 619.

In the present case there is not involved any controversy as to the right of appellants to participate, or the extent of their interest, in the trust funds which, for more than twenty-seven years, have been administered under the direction and control of the Common Pleas Court of Fayette County. The relief sought by them in the Federal Court under their amended bill of complaint is to require the trustees to restore to the funds alleged to have been lost by their illegal and negligent management of the trust, to remove them as trustees, and to make all trustees under the deed of trust give bond with surety for the faithful performance of their duties. Such relief is concerned exclusively with the administration of the trust. It is, of course, true that the trust res is not in the possession of the Fayette County Court as would be property in a receivership, but it seems reasonably clear that the administration of a trust falls properly within the class of cases governed by the principle giving to the Court first assum-

ing jurisdiction in proceedings *quasi in rem* the exclusive right to determine questions of administration and management, as distinguished from the adjudication of individual rights and interests in the res. Not only do the authorities previously quoted specifically include *trust administration* in their statement of the rule, but, what is of chief importance, the reason underlying the rule applies forcibly to trust estates. In the present case the appointment of all the successive trustees was either made or confirmed by the State Court. One of their accounts has been confirmed by that Court, and two others have been filed and are there pending, exceptions having been taken to them. In exercising jurisdiction over a trust estate a Court may frequently be obliged to make orders concerning even the physical custody and safekeeping of specific items of the trust property, or authorizing or directing their sale and the making of reinvestments; one order of the Court below in the present case, under date of November 6, 1933, directed the trustees to deposit certain bonds under a corporate reorganization plan for conversion into new debentures. An accounting by fiduciaries is in itself a proceeding quasi in rem, in the sense that it not only adjudicates the legality of the investments constituting the trust, but also, if it results in a surcharge, orders payment and restoration of moneys to the trust fund, that is to the res. Such a surcharge is not a judgment to pay money to individuals as in an ordinary personal action. Thus if appellants were successful in the proceedings under their bill in equity no judgment would or could be rendered for payment to *them* of any money; there could be merely an order for restitution to the trustees themselves as continuing trustees or to their successor trustees; in other words,

the recovery would be by the trust fund and not by appellants, who can gain therefrom only upon distribution of the income and ultimately of the corpus of the trust, as prescribed in the agreement by which it was created.

The line of distinction between proceedings in personam and those in rem to determine whether or not the jurisdiction acquired by the Court in which they are first instituted is exclusive is not to be drawn with academic nicety. The question is rather one of practical regard for the orderly and efficient administration of justice. If, as here, a Court has made or confirmed the appointment of trustees, has audited, and continues to be engaged in auditing, their accounts, and, in general, has controlled the management and administration of trust funds for a considerable period of time, and another Court were to attempt to remove such trustees, appoint others, pass upon the propriety of investments already investigated and adjudicated or in process of investigation and adjudication by the first Court, and make orders on the trustees as to the furnishing of surety bonds and similar matters, the management and administration of the trust would be thrown into chaotic condition. As has already been pointed out, practically all the investments specifically attacked in the bill filed by appellants in the Federal Court were contained in the account audited and confirmed by the County Court in 1925 or in the 1930 account now pending audit, or in both. Unless such successive steps in the administration of a trust be regarded as a unit, the result would be, not only that partial accounts could be successively filed and adjudicated in different

Courts, but the same account could be audited simultaneously by two Courts, with the obvious possibility of contradictory orders regarding the custody and sale of investments and the liability of the trustees.

The order of the Court below making absolute the rule of the trustees to show cause why appellants should not be enjoined and restrained from prosecuting the suit in equity in the District Court of the United States for the Western District of Pennsylvania is affirmed; costs to be paid by appellants.